

2014 WL 2813121 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)  
United States District Court, N.D. California.

Thomas L. WILLS, Successor Trustee of the Wills Management Employment Welfare  
Benefit Plan; and Donna Wills, an individual, and the Wills Family Irrevocable Trust II,  
as beneficiaries of the Wills Management Employment Welfare Benefit Plan, Plaintiffs,

v.

AMERICAN GENERAL LIFE INSURANCE COMPANY, and Does 1 through 10, inclusive, Defendants.

No. C-13-05860-EJD.  
March 13, 2014.

**Defendant American General Life Insurance Company's Notice of Motion and  
Motion for Judgment on the Pleadings; Memorandum of Points and Authorities**

[Michael K. Brisbin](#) (SBN 169945), [Dennis J. Rhodes](#) (SBN 168417) Wilson, Elser, Moskowitz, Edelman & Dicker LLP, 525  
Market Street, 17th Floor, San Francisco, CA 94105-2725, Telephone: 415.433.0990, Facsimile: 415.434.1370, for defendant,  
American General Life Insurance Company.

Judge: Hon. [Edward J. Davila](#).

**[FRCP 12\(c\)](#)**

**Date: May 9, 2014**

**Time: 9:00 a.m.**

**Location: Courtroom 4**

***Supporting Documents:***

**1. [Proposed] Order**

***NOTICE OF MOTION AND MOTION***

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 9, 2014 at 9:00 a.m. in Courtroom 4, 5th Floor, 280 S. 1st Street, San Jose, CA, or as soon thereafter as this matter may be heard, Defendant American General Life Insurance Company will move and hereby does move the Court for an order for judgment on the pleadings, or in the alternative, partial judgment on the pleadings. This motion is made pursuant to [Federal Rule of Civil Procedure 12\(c\)](#) and is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Court's file and records, and upon such other matters as the Court may consider at the time of hearing.

Date: March 13, 2014

WILSON, ELSER, MOSKOWITZ,

EDELMAN & DICKER LLP

By: /s/ Dennis J. Rhodes

Michael K. Brisbin

Dennis J. Rhodes

Attorneys for Defendant

AMERICAN GENERAL LIFE INSURANCE COMPANY

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### MEMORANDUM OF POINTS AND AUTHORITIES

American General hereby submits the following memorandum of points and authorities in support of its motion for judgment on the pleadings, or in the alternative, partial judgment on the pleadings.

#### I. INTRODUCTION AND SUMMARY OF ARGUMENT

This matter arises out of an apparent misuse of power and resulting theft of Plaintiffs' property by Gary Thornhill, trustee of the trust established by Plaintiff Donna Wills. In 2008, Plaintiffs appointed Gary Thornhill ("Thornhill"), as trustee of the Wills Management, LLC Employee Welfare Benefit Plan ("the Trust"). As trustee, Thornhill was accorded certain powers by virtue of his appointment. However in early 2013, Thornhill admitted that he intentionally misused the powers entrusted to him to take two loans against the cash value of the life insurance policy which American General Life Insurance Company ("American General" or "Defendant"), issued to the Trust in 1998. The two loans totaled approximately \$1.4 million. Thornhill further admitted that he intentionally made these loans for his own personal benefit and not to benefit the trust beneficiaries.

In a separate state court action, Plaintiffs sued Thornhill in Santa Clara Superior Court and obtained a confessed judgment on March 14, 2013. American General was not part of the state court action. In this action, Plaintiffs seek to hold American General liable for their trustee's personal misuse of the power Plaintiffs entrusted to him and seek recovery of the amounts which American General disbursed pursuant to the request of their authorized representative.

While American General recognizes this set of events as unfortunate, it cannot be held liable for Thornhill's misappropriation of funds. As the legal analysis herein demonstrates, American General lacked actual knowledge that Thornhill exceeded his powers when he applied for two loans from the policy's cash value. Because it lacked actual knowledge, [California Probate Code § 18100](#) shields American General from each and every claim for relief asserted in the Complaint whether based upon statute, case law or public policy. Thus, each claim for relief asserted in the Complaint fails.

Further, there are separate legal bases supporting judgment on the pleadings as to the causes of action for **elder abuse**, the two causes of action for aiding and abetting fail and the cause of action for violation of [Business and Professions Code § 17200](#). American General lacked actual knowledge that Thornhill intended to breach his fiduciary duty and to commit fraud by misappropriating funds. Therefore the **elder abuse** and aiding and abetting claims fail. Furthermore, American General did not engage in an unfair business practice by providing Plaintiffs' trustee with the loans he requested. The Probate Code specifically

empowers duly appointed trustees with the power to make such requests by virtue of the powers to control trust property. Each of these independent bases is explained in detail below and, as the Court will see, provides more than sufficient grounds for granting this motion.

## II. STATEMENT OF FACTS

The Complaint's allegations are summarized as follows. Plaintiff, Thomas Wills, is the Successor Trustee of the Wills Management, LLC Employee Welfare Benefit Plan. (¶1) Plaintiff, Donna Wills, is a beneficiary under the Plan. (¶2) In or around 1997, Thornhill became Richard and Donna Wills' financial advisor. (¶7) On or about December 1, 1997, Thornhill set up the ECI Welfare Benefit Plan & Trust, dated December 1, 1997. (¶8) On or around 1997, 1998, Thornhill was a licensed insurance agent for American General. (¶9)

On or about April 20, 1998, Thornhill sold to Richard and Donna Wills a universal life insurance policy issued by American General bearing policy number A70001695L (“the Policy”). (¶10) The Policy had a death benefit of \$15,400,000.00 and provided an accumulated cash surrender value of approximately \$3,000,000. *Id.* Richard Wills died on September 27, 2005 at 70 years old, leaving Donna Wills as the sole beneficiary under the Plan and the remaining insured under the Policy. (¶12)

From approximately 1998 through mid-2010, Thornhill was the producing agent and the servicing agent for the Policy. (¶13) In or around February 2008, Thornhill became the Successor Trustee of the Plan, replacing former trustee Republic Bank. (¶15)

At a time prior to 2010, Thornhill was named as a defendant in five lawsuits where American General was also named as a defendant. (¶16) In those lawsuits, Thornhill was accused of fraud, misrepresentation and breach of fiduciary duty. *Id.* On or about June 6, 2010, American General terminated Thornhill's appointment as a life insurance agent and his ability to sell life insurance on its behalf. (¶29) Thornhill continued to act as the servicing agent for the Policy. (¶30)

On or about January 28, 2011, Thornhill, as Trustee of the Plan, requested that American General disburse \$600,000.00 from the cash value of the Policy. (¶31) American General authorized the disbursement of the net amount of \$591,777.53 as a loan to Thornhill on or about January 31, 2011. *Id.* Approximately, nine months later, on or about October 27, 2011, without Donna Wills' knowledge or authorization, Thornhill, as Trustee of the Plan, requested that American General disburse \$800,000.00 from the cash value of the Policy. (¶32) American General authorized the disbursement of \$818,066.37 as another loan to Thornhill on or about October 28, 2011. *Id.* To date, Thornhill has received unauthorized distributions totaling \$1,409,843.90 from the Policy which he has not repaid. (¶33) Thornhill has admitted that he willfully withdrew a total of \$1,409,843.90 from the Policy's cash value for his own personal use and benefit, committing a breach of his fiduciary duties as trustee. (¶34)

Based on these allegations, Plaintiffs contend that Defendant's knowledge of Thornhill's multiple prior lawsuits, and its knowledge that Thornhill was the trustee of the Plan with access to the cash value, constitute special circumstances giving rise to a duty to act and to protect Plaintiffs from Thornhill's breaches of fiduciary duty, fraud and misappropriations. (¶37) Plaintiffs also contend that Defendant breached its duty by failing to exercise any due diligence prior to disbursing the loans, failing to place any kind of “alert” on the Policy, failing to notify Donna Wills that Thornhill was withdrawing \$1.4 million, failing to heed the red flags and conflict of interest, and failing to send any type of “comfort letter” or “activity letter” to Donna Wills, about the loans. (¶39)

In addition, Plaintiffs allege that Defendant committed **elder abuse** by assisting Thornhill in taking and retaining \$1.4 million from the Policy at a time when Donna Wills 74 years of age. (¶¶ 43, 44.) Plaintiffs further contend that Thornhill's admitted misappropriation of approximately \$1.4 million from the Policy for his own personal benefit was an indisputable breach of his fiduciary duties in which Defendant substantially assisted. (¶¶49-50) Plaintiffs allege that Defendant substantially assisted Thornhill's fraud by allowing him to obtain the funds without conducting any due diligence, investigation of his actions or notification to plaintiff Donna Wills. (¶57)

Plaintiffs thereafter contend Defendant's conduct constituted an unlawful, unfair and fraudulent business practice prohibited by [Business and Professions Code § 17200](#) (§62) and [Welfare & Institutions Code § 15630.1](#). (§63) Finally, Plaintiffs contend that Defendant breached the implied covenant of good faith and fair dealing. (§68)

### III. PROCEDURAL HISTORY

On September 9, 2011, plaintiffs filed their amended complaint in Santa Clara County Superior Court asserting six causes of action for negligence, financial **elder abuse**, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, unfair business practice and breach of the implied covenant of good faith and fair dealing. American General timely removed the matter on December 18, 2013. The Court has set a Case Management Conference for March 14, 2014. No pretrial or trial dates have been set.

### IV. LEGAL ARGUMENT

#### A. Legal Standard Under [Federal Rule of Civil Procedure 12\(c\)](#)

[Federal Rule of Civil Procedure 12\(c\)](#) provides that “[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.” A [Rule 12\(c\)](#) motion challenges the legal sufficiency of the opposing party's *pleadings*. The standard applied on a [Rule 12\(c\)](#) motion is essentially the same as that applied on [Rule 12\(b\)\(6\)](#) motions: i.e., judgment on the pleadings is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. Judgment on the pleadings is properly granted when [accepting all factual allegations in the complaint as true] there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law. *Chavez v. United States of America, et al.*, 683 F.3d 1102, 1108 (9th Cir. 2012), *citing Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

Under [Rule 12\(b\)\(6\)](#), dismissal of a pleading “is warranted under [Rule 12\(b\)\(6\)](#) where the complaint lacks a cognizable legal theory.” *Harper v. Poway Unified School District*, 345 F.Supp.2d 1096, 1102 (S.D. Cal. 2004). In assessing whether a pleading meets this standard, the Court is not required to “assume the truth of any legal conclusions merely because they are cast in the form of factual allegations, (*Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)), and “a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(internal citations omitted). In short, Plaintiffs must state factual allegations stating plausible grounds for relief, that is, a statement of the circumstances, occurrences, and events supporting the claim advanced, “enough to raise a right to relief above the speculative level. . .” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-557, fn. 3 (2007). Hence, the *Iqbal*, *Twombly* standard articulated above requires that a Court will discount conclusory statements which are not entitled to the presumption of truth before determining whether a claim is plausible. *Iqbal*, *supra*, 556 U.S. at 678.

Even though courts employ the same standard required by [Rule 12\(b\)\(6\)](#) in the context of a [Rule 12\(c\)](#) motion, the end result differs. Under [Rule 12\(b\)\(6\)](#), a successful motion results in the dismissal of the complaint. Under [Rule 12\(c\)](#), a successful motion results in judgment as a matter of law. *Chavez*, *supra*, 683 F.3d at 1108. As the *Chavez* court explains:

Analysis under [Rule 12\(c\)](#) is “substantially identical” to analysis under [Rule 12\(b\)\(6\)](#) because, under both rules, ‘a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.

*Id.*

Here, Plaintiffs' Complaint is devoid of allegations which support any viable claims against American General. The Complaint fails to meet the standard required under both [Rule 12\(c\)](#) and [Rule 12\(b\)\(6\)](#), as explained above by *Twombly*, *supra*, 550 U.S.

544 and *Iqbal*, *supra*, 129 S.Ct. 1937. Therefore, for the reasons which follow, American General is entitled to judgment as a matter of law.

**B. Plaintiffs' Complaint Fails to State Any Claim Upon Which Relief May Be Granted:**

**1. *California Probate Code § 18100* Shields American General From Liability For Thornhill's Misappropriation of Funds Under Any Theory In The Complaint**

California law unequivocally protects innocent third parties against breaches of duty by a trustee where the third party lacks *actual knowledge* that the trustee is exceeding his or her powers. This protection is afforded under *Probate Code § 18100* which provides as follows:

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

- (a) The third person *is not bound to inquire* whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.
- (b) The third person is *fully protected* in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

(Emphasis added.)

The scope of *section 18100* is broad. As the court explains in *Adler v. Manor Healthcare Corp.* (1992) F:

[*Section 18100*] protects third parties in *all* transactions with trustees where both the existence of the trust and the status of the trustees are known, and the third parties rely in good faith on the trustees' representations of the scope of their authority. Only where third parties have actual knowledge that trustees are exceeding or improperly exercising their powers do the third parties lose this protection.

*Id.* at 1116. (Emphasis in original.)

Relying upon this holding from *Adler v. Manor Healthcare*, the court in *Vournas v. Fidelity National Title Insurance Company* (1999) 73 Cal.App.4th 668, applied *section 18100* broadly and shielded an innocent third party without knowledge that the trustee was exceeding his powers from the trustee's breach of trust. In a set of facts very similar to those presented in this matter, the trustee in *Vournas* sold trust property without the trust beneficiaries' knowledge. The trust agreement specifically stated that the trustee had to obtain the consent of at least two of the trust beneficiaries before selling trust property. The trustee then used the sales proceeds for himself. Years later when the beneficiaries discovered the unauthorized sales, they sued the title insurance company, alleging that the title insurance company should have investigated and determined whether the trustee had obtained the beneficiaries' consent. In explaining how *section 18100* protected the title insurance company, the *Vournas* court reasoned as follows:

*Section 18100* was specifically adopted to change the prior law that placed third parties on constructive or inquiry notice of possible breaches of the trust. *Section 18100* protects third parties who deal with or assist the trustee by excusing them from investigating and permitting them to assume the existence of a trust power and its proper exercise except where the third parties have actual knowledge of a breach of trust.



*Id.* At 673.

The court then pointed out that the plaintiffs failed to allege that the title insurance company had *actual* knowledge of the trustee's violation. Therefore, the court held: "Because the statutory scheme exempts third parties from a duty to investigate, Fidelity breached no duty owed to (plaintiffs/beneficiaries). *Id.* at 673-674.

Here, Plaintiffs' entire complaint can state no claim for relief against American General as each and every claim is premised upon Plaintiffs' allegations that American General should be liable for Thornhill's alleged unauthorized loans from the Policy's cash value. First, the Complaint is devoid of any allegations that American General knew that Thornhill was exceeding his powers as trustee, was taking the policy loans for his own unauthorized purposes, or was requesting the funds with the intention to make off with the loan proceeds. Therefore, the "actual knowledge" requirement is lacking.

Second, it would make no sense for Plaintiffs to make such allegations. To suggest that American General would knowingly help a trustee steal money from its insured is irrational. It is completely illogical to think that American General would deliberately expose itself to liability by knowingly assisting Thornhill in his plan to abscond with approximately \$1.4 million. Rather, American General was permitted to rely upon Thornhill's request as Plaintiffs' trustee to withdraw the funds.

Third, there is no merit to Plaintiffs' allegations that American General failed to perform any due diligence. Assuming only for the purpose of this motion that such allegations are true, which American General denies, [Probate Code section 18100](#) and the cases interpreting it hold that the third party has no duty to investigate. Therefore, American General had no duty to question the request of a Plaintiffs' duly appointed trustee and no obligation to contact Plaintiffs prior to release of the funds. Clearly, Thornhill was functioning in his role as Trustee, authorized to effect transactions on behalf of the trust.

Finally, Plaintiffs' contentions based upon the fact that Thornhill was a defendant in five other lawsuits is a red herring. The fact that Thornhill was a party to prior litigation in which American General was also named does not constitute actual knowledge on American General's part that Thornhill withdrew the funds for his own benefit and not for the benefit of the trust beneficiaries. As [Probate Code section 18100](#), *Adler, supra*, 7 Cal.App.4th 1110 and *Vournas, supra*, 73 Cal.App.4th 668 require, the third party must have actual knowledge that trustees are exceeding or improperly exercising their powers.

Therefore, based on the broad protections afforded by [Probate Code section 18100](#), Plaintiffs' claims for negligence, **elder abuse**, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, unfair business practices and breach of the covenant of good faith and fair dealing fail. Thus, American General is entitled to judgment as a matter of law.

## ***2. Plaintiffs' Negligence Claim Fails As American General Was Entitled to Rely Upon Thornhill's Status and Representation as Trustee***

In order to prevail on a claim for negligence, plaintiffs must prove a duty owed to plaintiff, breach of that duty, causation and damages. *Houston, Inc. v. Love*, *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250. Here, Plaintiffs cannot prevail under a theory of negligence because American General does not owe them a duty of care. As analyzed above, [Section 18100](#) does not impose a duty on third parties without actual knowledge that a trustee is acting in violation of his or her powers. Hence, Plaintiffs cannot allege a key element of this cause of action. Again, *Vournas, supra*, 73 Cal.App.4th 668, is directly on point. There, the court did not impose a duty upon the title company to investigate the trustee's authority to enter into a business transaction. The court further declined to impose a duty to investigate whether the trustee had the beneficiaries consent.

The same outcome must result from the allegations before this Court as the negligence claim alleged against American General is substantially similar to the negligence claim alleged by the plaintiffs in *Vournas*. American General was entitled to rely on Thornhill's authority and had no duty to contact Plaintiff Donna Wills before honoring her trustee's request. Therefore, because there is no duty of care owed, the claim fails, entitling American General to judgment under [Rule 12 \(c\)](#).

### 3. Plaintiffs' Claims For Aiding And Abetting Fraud, Breach of Fiduciary Duty Fail To State A Claim

In their third and fourth causes of action, Plaintiffs seek liability to impose liability upon American General for aiding and abetting Thornhill's breach of fiduciary duty and fraud.<sup>1</sup> Plaintiffs allege that American General "substantially assisted Thornhill's misappropriation of funds by allowing him to obtain the funds ... despite its full knowledge of Thornhill's untrustworthiness, fraud and past breaches of fiduciary duties...." (§50) They further allege that American General "substantially assisted Thornhill's fraud by allowing him to obtain the funds from the Cash Value ... despite its full knowledge of Thornhill's untrustworthiness, fraud and past breaches of fiduciary duties...." (§57)

Under California law, civil liability for aiding and abetting may exist only if the defendant "(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145. Liability also depends on "proof the defendant had *actual knowledge* of the specific primary wrong the defendant substantially assisted." *Id.* (Emphasis added.) As explained by the California Supreme Court long ago in *Lomita Land & Water Co. v. Robinson* (1908)154 Cal. 36: "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation with knowledge of the object to be attained." *Id.* at 47. Further, as the court held in *Howard v. Superior Court* (1992) 2 Cal.App.4th 745: "Aiding and abetting necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." *Id.* at 748-749.

Here, Plaintiffs fail to allege the necessary requirement that American General had "actual knowledge" that Thornhill was acting in his own self-interest and for his own unauthorized purposes when he made the loan requests. Thus, American General had no knowledge that Thornhill was breaching his fiduciary duty to Plaintiffs and perpetrating a fraud upon Plaintiffs when he exercised his authority as Plaintiffs' Trustee to withdraw the proceeds. Furthermore, there are no allegations that American General made a "conscious decision to participate in the alleged tortious activity."

For the aiding and abetting claims to have any viability, Plaintiffs would need to have alleged that at the time Thornhill made the loan requests, American General *knew* that Thornhill intended to steal the funds for himself and intended to defraud Plaintiffs by covering up his actions. That would be tantamount to stating that American General actively and knowingly wanted to help Thornhill misappropriate \$1.4 million from a policy covering its insured to the insured's detriment. Such allegations would be nothing short of nonsensical, if not ludicrous. To suggest that an insurance company would willingly and intentionally assist fraud and theft - which it knows would invite liability - is irrational. Therefore, this Court should find that the aiding and abetting claims fail, entitling American General to judgment as a matter of law.

### 4. Plaintiffs' Cause of Action For Elder Abuse Fails To State A Claim

In their second cause of action, Plaintiffs allege that American General committed **elder abuse** by assisting Thornhill in taking and retaining \$1.4 million from the Policy at a time when Donna Wills 74 years of age. Plaintiffs attempt to plead this claim under [California Welfare & Institutions Code § 15610.30](#), which provides in relevant part:

(a) "Financial **abuse**" of an **elder** or dependent adult occurs when a person or entity does any of the following:

- (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.
- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.



Under the clear language of the statute, liability for assisting financial **elder abuse** hinges on taking, secreting, appropriating or retaining property for a wrongful use or an intent to defraud, or both. Once again, [Probate Code § 18100](#) is a shield to any claims based on financial **elder abuse** as explained above. Those arguments are incorporated herein.

Moreover, as the court explained in *Das v. Bank of America* (2010) 186 Cal.App.4th 727, California law does not impose strict liability for assisting financial **elder abuse** where a business entity unknowingly facilitated a third party's misappropriation of funds. In *Das*, the plaintiff brought claims against Bank of America for allowing her mentally diminished father to transfer funds from Bank of America to overseas accounts held by lottery scam artists. The plaintiff alleged that the bank was put on notice and should have reported the suspected **elder abuse** to law enforcement. The court refused to impose liability on the bank for financial **elder abuse** and held as follows:

In our view, [Section 15610.30] cannot be understood to impose strict liability for assistance in an act of financial **abuse**. Generally, California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability may be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of a duty and gives substantial assistance or encouragement to the other so to act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.

*Id.* at 744.

The court held that the “actual knowledge” component needed to establish liability for aiding and abetting *must* be read into the statute for assisting financial **elder abuse**.

Here, as already pointed out, American General had no actual knowledge of Thornhill's decision to steal funds and defraud Plaintiffs. Plaintiffs fail to allege this critical fact and, for reasons already explained, it would make no sense for them to do so. Thus, here is another basis, in addition to the bar to liability under [Probate Code § 18100](#), upon which to find American General cannot be liable for Thornhill's **abuse** of his powers. Therefore, as with the aiding and abetting claims, American General is entitled to judgment as a matter of law.

### ***5. Plaintiffs' Claim For Unfair Business Practices Is Insufficient To State A Claim***

In their fifth cause of action for violation of [California Business and Professions Code § 17200](#), Plaintiffs allege that American General engaged in unlawful, unfair and fraudulent business practices. (§62) Plaintiffs claim that by not reporting Thornhill's “reasonably apparent” **abuse** and by allowing Thornhill to continue as servicing agent despite what Plaintiffs contend are “danger signals” and “red flags” due to Thornhill's alleged prior “breaches of fiduciary duty,” American General engaged in an unfair business practice. *Id.*

To state a claim under the [California Business and Professions code § 17200](#) (“§ 17200”), Plaintiffs must demonstrate that the American General engaged in a business practice that was unlawful or unfair. Under California law, an unfair business practice or act occurs when it offends an established public policy or if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to the consumer. *Searle v. Wyndham*, 102 Cal.App.4th 1327, 1334 (2002).

It is well established that a business practice cannot be unfair if that practice is permitted by law. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 182, 186, 187 (1991). Here, American General was well within its rights to honor the request of Plaintiffs' trustee to take loans from the Policy's cash value. It is a well understood principle that a trustee is empowered to control the assets of the trust. As articulated by the court in *Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132:

The Probate Code confers powers on a trustee that enable effective discharge of this duty. A trustee has the power to ... manage trust property (§ 16227) and to “borrow money for any trust purpose” (§ 16241); ... The trustee also has those powers necessary to act as a reasonable administrator of the trust and as a prudent investor. (§ 16200, subd. (c).) In short, the trustee has all the powers needed for effective transaction of business on behalf of the trust.”

It is undisputed that Thornhill was the trustee at the times the two policy loans were requested and the funds delivered. As such, he had statutory authority to request the policy loans.

Further, there was no unlawful, unfair or fraudulent conduct by American General in processing the loan requests by virtue of the fact that Thornhill was empowered by his appointment and the powers inherent in his position. The later discovered fact that he took the loans for a purpose contrary to the benefit of the trust, and the later admission that they were for his own purposes, does not make the processing of the loans unlawful, unfair or fraudulent, hence not an unfair business practice.

In addition, the allegation that allowing Thornhill to function as the servicing agent for the Policy constituted an unfair business practice is a red herring. Plaintiffs cannot lose sight of the fact that Thornhill was their appointed trustee in charge of all aspects of administering the trust. To contend that Thornhill's status as servicing agent gives rise to a violation of [section 17200](#), is short sighted and begs the Court to ignore the central fact that Plaintiffs themselves entrusted Thornhill with the very powers he admitted to **abusing**. They cannot now shift liability to American General for their trustee's **abusive** conduct.

Further, as analyzed above, [section 18100](#) insulates American General from liability as it did not have actual knowledge that Thornhill was taking the loans for an unauthorized purpose. It is apparent that [section 18100](#) contemplates that trustees will misuse their powers to the detriment of the trust and the trust beneficiaries. However, the law further contemplates that innocent third parties, such as American General in this instance, are not held liable for the trustee's breaches unless they have actual knowledge of the trustee's intent.

To the extent Plaintiffs seriously contend as they state in paragraph 62 of the Complaint, that American General engaged in a fraudulent business practice, this cause of action must fail. Ninth Circuit authority stands for the proposition that, in order to sustain a claim under [section 17200](#) that is based on fraud, a plaintiff must set forth “more than the neutral facts necessary to identify” the unfair practice. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). If a plaintiff fails to plead a [section 17200](#) claim with particularity, such a claim is subject to dismissal under Rule 9(b). *Id.* The facts constituting the fraud, including every element of the cause of action, must be alleged factually and specifically.’” *Apollo Capital Fund, L.L.C. v. Roth Capital Partners, L.L.C.*, 158 Cal.App.4th 226, 240 (2007). “The objectives are to give the defendant notice of definite charges which can be intelligently met and to permit the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.” *Id.* Here, there are no allegations upon which to base a claim for fraud and no allegations of fraudulent conduct. Hence, the allegation of an alleged fraudulent business cannot survive.

Finally, Plaintiffs' request for a disgorgement of profits is improper. The California Supreme Court has determined that “nonrestitutionary disgorgement of profits is not an available remedy in an individual action under [section 17200](#). *Korea Supply Co.* (2003) 29 Cal.4th 1134, 1152. Direct victims of a [section 17200](#) violation may obtain injunctive and restitutionary relief, but allowing nonrestitutionary disgorgement would enable plaintiffs to “obtain tort damages while bypassing the burden of proving the elements of liability under traditional tort” theories. *Id.* at 1151.

Here, Plaintiffs clearly are seeking recovery only for themselves, but also ask the Court to order American General to disgorge “disgorge any profits obtained.” (§65). Such a request is directly at odds with *Korea Supply Co.*, *supra*, 29 Cal.4th at 1152. Thus, Plaintiffs' disgorgement claim is without merit.

**6. Plaintiffs' Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing Fails To State A Claim Upon Which Relief May Be Granted**

Plaintiffs' final cause of action is for breach of the implied covenant of good faith and fair dealing. The terse allegations merely claim that because Plaintiffs and American General entered into a contractual relationship, American General owed them a duty to act in good faith, deal fairly and not deprive them of the benefit of the contract. (The Complaint, ¶67 - ¶69.)

The general rule governing claims for breach of the implied covenant of good faith and fair dealing provides that when the claim does not sound in tort, the action is a garden variety breach of contract action for which only contract damages may be recovered. *Thompson Pacific Const., Inc. v. City of Sunnyvale*, 155 Cal.App.4th 525, 541 (2007).

Here, Plaintiffs only theory of recovery is for breach of contract. Yet, as is abundantly clear at this point, [Probate Code § 18100](#) protects American General and is an absolute defense to this claim predicated upon Thornhill's alleged misappropriation of funds and fraud. Therefore, American General is entitled to judgment on this claim, as well.

**V. CONCLUSION**

As American General has shown, there can be no basis upon which Plaintiffs' complaint can stand. The protection provided by [Probate Code section 18100](#) is unequivocal. In addition, there are independent bases for finding Plaintiffs have failed to state a claim for financial **elder abuse**, aiding and abetting and unfair business practices. Therefore, American General respectfully requests that judgment be entered in its favor as requested herein.

Date: March 13, 2014

WILSON, ELSER, MOSKOWITZ,

EDELMAN & DICKER LLP

By: /s/ Dennis J. Rhodes

Michael K. Brisbin

Dennis J. Rhodes

Attorneys for Defendant

AMERICAN GENERAL LIFE INSURANCE COMPANY

**Footnotes**

- 1 While the second cause of action for financial **elder abuse** would normally be addressed at this juncture, the analysis of financial **elder abuse** is dependent upon and directly related to the law governing civil liability for aiding and abetting. Therefore, American General analyzes the aiding and abetting claims first.